

HAMDAN JOHAN & ORS

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v.

FELCRA BHD & ORS AND ANOTHER CASE

HIGH COURT MALAYA, JOHOR BAHRU

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VERNON ONG LAM KIAT JC

[CIVIL SUIT NOS: (MT1) 22-637-2009 & (MT1) 22-638-2009]

12 JANUARY 2010

CONTRACT: Breach - Compensation - Measure of damages recoverable - Section 74 Contracts Act 1950 - Affirmation of common law rule in *Hadley v. Baxendale* - Aggrieved party to be put in position as if contract had been performed - Recovery of loss of profits - Recovery of loss resulting from physical displacement suffered by plaintiffs under aborted Felcra scheme

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CONTRACT: Breach - Consequences, of - Option of innocent party whether to accept repudiation - Right of innocent party to terminate or affirm contract - Whether plaintiffs had accepted defendant's breach by accepting compensation payment under protest

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CONTRACT: Breach - Establishing breach - Breach by conduct - Refusal to perform obligations under agreement in its entirety

LAND LAW: Alienation and incidents - Validity of - Menteri Besar Johor agreeing in principle to alienate land to plaintiffs under Felcra scheme - Alienation not carried out - Whether Johor state government obliged to alienate lands in question to plaintiffs

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LAND LAW: Indefeasible title and interest - Alienation - Menteri Besar Johor agreeing in principle to alienate land to plaintiffs as participants of Felcra scheme - Alienation not carried out - Whether plaintiffs had interest in lands in question

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In 1994 the 1st defendant (Felcra) invited the plaintiffs to take part in a project for the development of an oil palm plantation known as Felcra Tebing Runtuh (FTR). The Menteri Besar Johor agreed in principle that the FTR land be alienated to the plaintiffs. The land on which FTR was located was later scheduled for the development of the Malaysia-Singapore second link. In light of the low and unreasonable compensation given by United Engineering Malaysia Berhad, it was agreed by the defendants that the plaintiffs be alienated with titles of their respective lands. All the plaintiffs then entered into agreements with the 1st defendant ('the agreement')

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- A which took effect retrospectively from 15 August 1994. Some plaintiffs were allotted lands and houses constructed by the 1st defendant whereas the other plaintiffs were allocated lands only. In 2001 the plaintiffs each received compensation consisting of RM173,688.58 in cash, a plot of land valued at RM135,000 together with a house valued at RM50,000 erected thereon and asked to leave FTR. The plaintiffs claimed that under the National Land Rehabilitation And Consolidation Authority (Incorporation) Act 1966 ('Felcra Act') and the Land (Group Settlement Areas) Act 1960 ('GSA Act') they had a legitimate expectation to receive titles to their respective landholdings and/or to receive adequate compensation. The plaintiffs contended that they never received any notice of termination of the agreement or termination of their participation in FTR. They also claimed that were not accorded any hearing on the adequacy of compensation and that the valuation report relied on by the defendants in arriving at a value for compensation was outdated. The issues which arose for determination were: (i) whether the plaintiffs had an interest in the land; (ii) whether the 1st defendant repudiated the agreement if so, whether the plaintiffs accepted the repudiation; and (iii) whether the plaintiffs were adequately compensated?
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Held:

- (1) The land had not been alienated to the plaintiffs or to the 1st defendant. The plaintiffs were not the registered owners of the land under the National Land Code ("NLC") NLC or the GSA Act. The land was not subjected to an acquisition under the Land Acquisition Act 1960 ("LA Act"); it was reacquired by the 3rd defendant. There was no evidence to show that the FTR land had been gazetted as a group settlement area under the GSA Act; neither was there any evidence that the plaintiffs were registered as occupants in expectation of title under s. 12 of the GSA Act. The 3rd defendant was not under any obligation to carry out what the Menteri Besar agreed to in principle. The 3rd defendant had not committed itself to alienate the FTR land to the plaintiffs. (para 11)
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- (2) By its conduct, the 1st defendant had indicated to the plaintiffs that it did not intend to go on with the agreement. This act constituted a breach of the agreement on the part of the 1st defendant. In refusing to perform its obligations under the agreement in its entirety the 1st defendant had clearly repudiated or renounced the agreement. (para 15)
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- (3) Repudiation by the 1st defendant did not put an end to the agreement. As the agreement had been broken the plaintiffs were entitled to be compensated for damages for any loss which they had suffered by reason of the breach. The plaintiffs being the innocent parties had the option of either (i) to terminate the agreement, or (ii) to affirm the agreement. On the evidence, the plaintiffs had opted to accept the breach when they accepted the compensation payment from the 2nd defendant under protest and moved out of FTR and or surrendered their rights under the agreement. (para 16)
- (4) The law on compensation for loss or damage caused by breach of contract is governed by s. 74(1) and (2) of the Contracts Act 1950. The measure of damages recoverable involves the consideration of s. 74 which substantially affirms the common law rule laid down in *Hadley v. Baxendale* [1854] 156 ER 145. In the assessment of damages for breach of contract, the general rule is that the aggrieved party be put in the same position as if the contract had been performed; so that normally he is entitled to recover from the contract breaker his loss of profits, or the benefit of the bargain. (paras 18, 19 & 20)
- (5) Under the agreement the plaintiffs agreed to sell all the harvested oil palm fruits to the 1st defendant. The proceeds from the sale of the oil palm fruits were subject to deductions on account of monies advanced by the 1st defendant, the 1st defendant's operating expenses and development costs. Allowing for an increase in production over the years and subject to a commensurate increase in operating expenditure, the amount that would have been distributed to each participant was about RM3,000 per annum from 2001 to 2009; this computed to RM27,000 for each plaintiff. (paras 23 & 24)
- (6) It was reasonable to consider the loss for the displacement suffered by the plaintiffs. The plaintiffs had settled in FTR since 1994 expecting it to be a long term commitment. Instead they were displaced after seven years. They had given up their former vocations after resettling in FTR. For the loss and damage for the displacement of their lives, compensation in the sum of RM500,000 per participant was a fair and reasonable sum. (para 25)

[Order accordingly.]

A Case(s) referred to:

Attorney General of Hong Kong v. Ng Yuean Shiu [1983] 2 All ER 346
(*refd*)

Basnol Abol & Ors v. The State Government of Sarawak & Other Appeals
[2004] 2 CLJ 553 (*refd*)

B *Central Malaysia Development Company Ltd v. Chin Pak Chin* [1967] 1 LNS
15 HC (*refd*)

Chuah Say Hai & Ors v. Collector of land Revenue, Kuala Lumpur [1967]
1 LNS 34 HC (*refd*)

Darahman Ibrahim & Ors v. Majlis Mesyuarat Kerajaan Negeri Perlis & Ors
[2008] 4 CLJ 538 CA (*refd*)

C *Goh Seng Peow & Sons Realty Sdn Bhd v. The Collector of Land Revenue,
Wilayah Persekutuan* [1986] 1 CLJ 414; [1986] CLJ (Rep) 348 HC (*refd*)
Hadley v. Baxendale [1854] 156 ER 145 (*refd*)

Hock Lim Estate Sdn Bhd v. Collector of Land Revenue, Johor Bahru [1979]
1 LNS 31 FC (*refd*)

D *HP Projects Sdn Bhd v. Investprop (M) Sdn Bhd* [2005] 3 CLJ 851
CA (*refd*)

Law Pang Ching & Ors v. Tawau Municipal Council [2010] 2 CLJ 821
CA (*refd*)

*Magasu Sundram Magasu & Ors v. Pentadbir Tanah Wilayah Persekutuan
Kuala Lumpur* [2003] 2 CLJ 422 HC (*refd*)

E *Regina v. North and East Devon Health Authority Ex parte Coughan* [2001]
QB 213 CA (*refd*)

Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch 149 (*refd*)

Sidek Hj Muhamad & Ors v. The Government of the State of Perak & Ors
[1982] CLJ 244; [1982] CLJ (Rep) 321 FC (*refd*)

F *Teoh Kee Keong v. Tambun Mining Company Ltd* [1967] 1 LNS 197 FC
(*refd*)

Zainal Abidin v. Century Hotel Sdn Bhd [1986] 1 LNS 2 SC (*refd*)

Legislation referred to:

Contracts Act 1950, ss. 40, 74(1), (2)

G Federal Constitution, art. 13

Land (Group Settlement Areas) Act 1960, s. 12, 19, 20, 35

Land Acquisition Act 1960, s. 2

Other source(s) referred to:

Fiadjoe, *Commonwealth Caribbean Public Law*, 2nd edn (Cavendish
Publishing Limited: London, 1999), pp 34, 35

H W Wade & C Forsyth, *Administrative Law*, 8th edn (Oxford University
Press: Oxford, 2000), pp 494, 495

(Civil Suit No: (MT1) 22-637-2009)

For the plaintiffs - Desmond Lewis (K Sasindran, Jf Naidu & S Jayakumar
with him); M/s Nor Ding & Co

I For the 1st defendant - Wan Sharifah Wan Yusoff; M/s Wan Sharifah
Jamilah & Partners

For the 2nd & 3rd defendant - Datuk Abd Rahman Putra Dato' Hj Taha;
State Legal Advisor

(Civil Suit No: (MT1) 22-638-2009)

For the plaintiffs - Syed Faisal; M/s Syed Faisal & Company

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*For the 2nd & 3rd defendant - Datuk Abd Rahman Putra Dato' Hj Taha;
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Reported by Amutha Suppayah

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JUDGMENT

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Vernon Ong Lam Kiat JC:

[1] The plaintiffs were participants in a FELCRA agricultural project for the planting of oil palm in Johor. In 2001 the land was reacquired by the Johor State Government (the 2nd and 3rd defendants) and the plaintiffs received compensation. The plaintiffs are seeking declaratory orders affecting their rights as participants and for loss and damages for being dispossessed of their respective land holdings in the said project.

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The Facts As Disclosed In The Evidence

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[2] In 1994 the Federal Land Consolidation and Rehabilitation Authority (Felcra) (the 1st defendant) invited the plaintiffs to take part in a project for the development of an oil palm plantation known as Felcra Tebing Runtuh (FTR). By a letter dated 4 April 1995 the Menteri Besar Johor agreed in principle that the FTR land be alienated to the plaintiffs. On 22 July 1995 there was a meeting between representatives of the 1st defendant, the Pentadbir Daerah Tanah Johor Bahru (2nd defendant) and 3rd defendant, a representative of a political party and the plaintiffs' representative one Madon bin Johan (PW4). The land on which FTR was located was scheduled for the development of the Malaysia-Singapore second link. They expressed dissatisfaction with the low and unreasonable compensation given by United Engineering Malaysia Berhad. The meeting agreed that in order to overcome this problem the plaintiffs be alienated with titles of their respective lands. The plaintiffs were required to execute an agreement with the 1st defendant and PW4 was asked to explain the situation to the plaintiffs. In 1995 all the plaintiffs entered into separate and individual agreements with the 1st defendant ('the agreement'); the agreement were only dated and stamped in 1997. The agreement took effect retrospectively from 15 August 1994. The plaintiffs in suit 637 were each allotted 1 unit of share equivalent to six acres of land and provided with houses

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- A constructed by the 1st defendant. The plaintiffs in suit 638 were each allotted 1 unit of share each for the value of 4 acres of land; they were not provided with houses by the 1st defendant. In 2001 the plaintiffs each received compensation amounting to RM358,688.58 consisting of RM173,688.58 in cash, a plot of land
- B valued at RM135,000 together with a house valued at RM50,000.00 erected thereon and asked to leave FTR. The 3rd defendant has taken back the FTR land for the development of 'Projek Laluan Kedua Malaysia-Singapura Dan Pembangunan Bandar Nusa Jaya.'

C **Plaintiff's Case**

- [3] The plaintiffs contend that they have rights and interest in their respective landholding of 1 shares each consisting of 4 or 6 acres in FTR. Under the National Land Rehabilitation And Consolidation Authority (Incorporation) Act 1966 ('Felcra Act') and
- D the Land (Group Settlement Areas) Act 1960 ('GSA Act') the plaintiffs have a legitimate expectation to receive titles to their respective landholdings and or a legitimate expectation to receive adequate compensation as persons having rights and interest in land based on the principles of justice and fairness. The plaintiffs also
- E contend that they have never received any notice relating to the termination of the agreement, termination of their participation in FTR, or of any breach of contract from the 1st defendant. They were not accorded any hearing on the adequacy of compensation. The valuation report dated 27 December 1992 relied on by the
- F defendants in arriving at a value for compensation was outdated and irrelevant as at the date the plaintiffs were dispossessed from FTR. The defendants have also violated the GSA Act, the Land Acquisition Act 1960 (Act 486), and art. 13 of the Federal Constitution.

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1st Defendant's Case

- [4] The 1st defendant was appointed by the 3rd defendant to develop FTR. The 1st defendant's duty is limited to the rehabilitation and development of the land for the purpose of
- H cultivation of oil palm plantation. The land was not gazetted under the GSA Act. The selection of the participants for the FTR project was not within the 1st defendant's control; it was vested in the 3rd defendant. Under the National Land Code only the power to
- I alienate the land is vested in the sole discretion of the 3rd defendant and not the 1st defendant. The plaintiffs have been discharged from further performance under the Agreement upon receipt of the compensation (*Basnol Abol & Ors v. The State*)

Government of Sarawak & Other Appeals [2004] 2 CLJ 553; *Sidek Hj Muhamad & Ors v. Government of the State of Perak & Ors* [1982] CLJ 244; [1982] CLJ (Rep) 321 FC; *Law Pang Ching & Ors v. Tawau Municipal Council* [2010] 2 CLJ 821; *Attorney General of Hong Kong v. Ng Yuean Shiu* [1983] 2 All ER 346; ss. 12, 19 & 20 GSA Act). By their conduct of receiving the compensation offered by the 2nd and 3rd defendants the plaintiffs have evinced an intention not to be further bound by the agreement. The plaintiffs have been duly informed of the intended acquisition of the FTR land through their representative PW4 who attended the meeting on 22 July 1995. The plaintiffs were given the right to be heard on the issue of compensation (*Zainal Abidin v. Century Hotel Sdn Bhd* [1986] 1 LNS 2 SC; *HP Projects Sdn Bhd v. Investprop (M) Sdn Bhd* [2005] 3 CLJ 851 CA).

2nd & 3rd Defendants' Case

[5] The plaintiffs have no legal rights in the land under the FTR. The 3rd defendant, the Majlis Mesyuarat Kerajaan Negeri Johor, the EXCO, secretary to the Menteri Besar are not one and the same entity. The secretary to the Menteri Besar had no authority to act on behalf of the 3rd defendant (*Basnol Abdol & Ors, supra*). The plaintiffs were given the right to be heard through PW4 at the meeting. The plaintiffs have no legitimate expectation against the 3rd defendant; there was no agreement between the 2nd and 3rd defendants and the plaintiffs. The plaintiffs are not registered as owners under the National land Code ('NLC'); neither were they registered under the GSA Act. Under the NLC only the State Authority has the power to alienate land.

Findings Of The Court

[6] The question of the adequacy of compensation is dependent upon whether the plaintiffs have any rights or interest in the FTR land. It is also pertinent to determine if the 1st defendant repudiated the agreement; and if so, whether the plaintiffs accepted the repudiation. Accordingly, the issues to be determined are as follows:

- Whether the plaintiffs have an interest in the land?
- Whether the 1st defendant repudiated the agreement? If so, whether the plaintiffs accepted the repudiation?
- Whether the plaintiffs were adequately compensated?

A *Whether The Plaintiffs Have An Interest In The Land?*

[7] It is the plaintiff's contention that they have an interest in the land by virtue of their respective holding of 1 unit of share under the agreement. The plaintiffs in suit 637 entitlement for their 1 unit of share is equivalent to 6 acres in FTR. In order to appreciate the plaintiff's argument, it is necessary to examine the salient features of the agreement as follows:

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(a) The 1st defendant agreed to register each and every one of the plaintiffs as a holder in the register of holdings holding one share equivalent to 4 or 6 acres, as the case may be, in FTR under s. 35 GSA Act. (cl. 11)
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(b) The plaintiffs agreed to pay to the 1st defendant all expenses incurred or advanced by the 1st defendant for the development of FTR. The payments to the 1st defendant will be paid by the plaintiffs in instalments over a period of 15 years by way of deductions from the income derived from the sale of oil palm fruits from FTR (cls. 13B & 14)
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(c) The plaintiffs also agreed to pay the annual charge under s. 20 GSA Act to the 3rd defendant. The payments are to be made to the 1st defendant in 15 annual instalments by deductions from the profits of the shares registered in each plaintiff's name. (cl. 13A)
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(d) Once the payments under cls. 13A and 13B have been satisfied, the 1st defendant will return the whole of FTR site to the 3rd defendant for alienation to the plaintiffs whether by way of shares in a co-operative or other method. (cl. 19)
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(e) The agreement is deemed to be in force with effect from 15 August 1994.
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[8] The plaintiffs also contended that the Felcra Act was enacted to uplift the living standards of the poor rural folk. The 1st and 3rd defendants having encouraged the plaintiffs to participate in the FTR scheme gave the plaintiffs a direct interest in their respective landholdings as persons occupying the landholdings in expectation of title and thereby being interested in the land. The plaintiffs have a legitimate expectation to receive the titles to their respective landholdings (art. 13, Federal Constitution; s. 2, Land Acquisition Act 1960 ('LA Act'); *Magasu Sundram Magasu & Ors v. Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur* [2003] 2 CLJ 422; *Goh Seng Peow & Sons Realty Sdn Bhd v. The Collector of Land Revenue,*

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Wilayah Persekutuan [1986] 1 CLJ 414; [1986] CLJ (Rep) 348; *Darahman Ibrahim & Ors v. Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 CLJ 538 CA and s. 2 of the GSA Act; *Regina v. North and East Devon Health Authority Ex parte Coughan* [2001] QB 213 CA).

[9] The underlying principle behind the doctrine of legitimate expectation is founded on the duty to act fairly as a necessary element or concomitant of good governance or good administration (W Wade & C Forsyth, *Administrative Law*, 8th edn (Oxford University Press: Oxford, 2000) 494 to 495; and Fiadjoe, *Commonwealth Caribbean Public law*, 2nd edn (Cavendish Publishing Limited: London, 1999) at pp. 34 to 35). The doctrine of legitimate expectation was initially recognised by Lord Denning MR in *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch 149, CA to denote something less than a right which may nevertheless be protected by the principles of natural justice; or an expectation of receiving some benefit or privilege to which the individual has no right (see *Darahman Ibrahim, supra*). In the Privy Council case of *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629 Ng Yuen Shiu an illegal immigrant challenged a deportation order. He contended that the Hong Kong government had previously given an undertaking that each case would be considered on its merits and that he was denied the opportunity of being heard. The Privy Council held that Ng had a legitimate expectation that a certain procedure would be followed and it was in the interest of good administration that the authorities should act fairly by implementing its stated policy. Lord Fraser said that “legitimate expectations in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis”. His Lordship identified three practical questions underlying all legitimate expectation cases. They are:

- (i) To what has the authority committed itself?
- (ii) Has the authority acted unlawfully in respect of its commitment?
- (iii) What should the court do about it?

[10] Thus, in *Darahman Ibrahim, supra* at p. 566 the Court of Appeal said that “where an applicant can demonstrate that a legitimate expectation has arisen, he has a powerful argument against a public body which has otherwise acted pursuant to the discretionary powers or duties lawfully conferred upon it. It is

- A germane to state that a legitimate expectation in its procedural
from arises where there has been a failure to follow an agreed, or
customary, process of consultation. In the main, it is concerned
about the quality of the decision making process.”
- B [11] Whether an expectation exists is a question of fact. Land is
defined to include land tenure, Malay reservations, permits and
licences for prospecting mines, compulsory acquisition of land,
transfer of land, mortgages; leases and charges, easements escheat,
treasure trove excluding antiquities (Federal Constitution sch 9 list
C II). Though land is essentially a State matter, the National land
Code has been promulgated to consolidate the laws relating to land
and land tenure, the registration of title to land and of dealing
therewith and the collection of revenue there from within the
various States including the State of Johore. In this case the land
D in question is the State of Johor’s land. The land has not been
alienated to the plaintiffs or to the 1st defendant. The plaintiffs are
not the registered owners of the land under the NLC or the GSA
Act. The land was not subjected to an acquisition under LA Act; it
was reacquired by the 3rd defendant. The alienation of land is
E subject to the provisions of the NLC. There is no evidence to show
that the FTR land has been gazetted as a group settlement area
under the GSA Act; neither is there any evidence that the plaintiffs
are registered as occupants in expectation of title under s. 12 of the
GSA Act. The plaintiffs also contended that *vide* the letter dated
F 4 April 1995 (exh. P43) the 3rd defendant had agreed to alienate
the landholdings to the plaintiffs. P43 is a letter written by the
secretary to the Menteri Besar Johor. Under the NLC the State
Authority is defined as the Ruler or Governor of the State, as the
case may be. It follows that the State Authority and the Menteri
G Besar are not synonymous. Accordingly, the 3rd defendant is not
under any obligation to carry out what the Menteri Besar agreed to
in principle. The 3rd defendant and the Menteri Besar are separate
legal entities, although the Menteri Besar formed part of the 3rd
defendant (*Basnol Abol & Ors, supra*). The plaintiffs also contend
H that under cl. 19 of the agreement the 1st defendant agreed to
hand back the FTR land to the 3rd defendant to be alienated to
the plaintiffs. In the same vein the 1st defendant’s representations
in cl. 19 is not binding on the 3rd defendant as the 1st and 3rd
defendant are separate legal entities. In the circumstances the 3rd
I defendant has not committed itself to the plaintiffs to alienate the
FTR land to the plaintiffs.

[12] The cases cited by learned counsel for the plaintiffs are distinguishable. In *Mangasu Sundram, supra* the intended intervenor applied to be included as a party to the action concerning the acquisition of land under the LA Act. Allowing the application the High Court held that the term 'person interested' is inconclusive and a person can be said to be interested if he has interest in the land either directly or indirectly or if he has interest in the compensation in respect of the land acquired. That case is distinguishable for a number of reasons. Firstly, the FTR land was not acquired under the LA Act; secondly, the plaintiffs have not been able to identify or delineate their respective landholding as the FTR land has not been alienated or subdivided. In *Goh Seng Peow & Sons Realty Sdn Bhd, supra*, the applicant company was the registered owner of 2 lots of land which had been compulsorily acquired under the LA Act. The applicant company only came to know of the acquisition proceedings after the compensation award was made by the respondent. The applicant company contended that the acquisition proceedings were illegal, null and void as they had no notice whatsoever of the acquisition proceedings and the necessary notices were not served on them as required by law. The High Court ruled that the acquisition proceedings had taken place contrary to the LA Act and in breach of the fundamental rules of natural justice and the applicant company has made out a case that its constitutional right might have been impinged, contrary to art. 13 of the Federal Constitution thus entitling the applicant company to seek a declaration. That case is also distinguishable on the facts as the applicant company was the registered owner of the 2 lots of land whereas in this case the plaintiffs are not; further that case related to an acquisition under the LA Act. In *Darahman Ibrahim, supra* the plaintiffs who were displaced by a dam project were resettled in an area known as Lubuk Sireh. The plaintiffs contended that in consideration of their agreeing to resettle in Lubuk Sireh the 2nd defendant had promised to provide them not only compensation for loss of land, houses, etc and a plot of land to build their houses; they were also promised participation in the agricultural estate undertaken by Felcra. The High Court dismissed their claim; on appeal the Court of Appeal found that there was overwhelming evidence that the plaintiffs were accepted as participants of the Felcra scheme. *Darahman Ibrahim, supra* is also distinguishable on the facts. In the present case whether or not the plaintiffs are participants of FTR is not disputed. For the foregoing reasons the plaintiffs' contention that they have a legitimate

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- A expectation to receive titles to their respective landholdings is misconceived and without merit. The question is therefore answered in the negative.

B *Whether The 1st Defendant Repudiated The Agreement?: If So, Whether The Plaintiffs Accepted The Repudiation?*

- [13] The agreement is for the duration of 15 years and scheduled to lapse on 14 August 2009. The 1st defendant contends that the plaintiffs were informed that the FTR land would be used for the construction of the Malaysia-Singapore second link when PW4 attended the meeting on 22 July 1995. The meeting also expressed their dissatisfaction over the compensation offered by UEM. The 1st defendant's contention is that in receiving the compensation the plaintiffs have evinced an intention not to be bound by the agreement (*Zainal Abidin v. Century Hotel Sdn Bhd* [1986] 1 LNS 2 SC; *HP Projects Sdn Bhd v. Investprop (M) Sdn Bhd* [2005] 3 CLJ 851). In *Zainal Abidin*, *supra* the appellant entered into a tenancy agreement with the respondent for the sublet of the third floor of the hotel for three years. Subsequently the respondent decided to close down the hotel and ordered the appellant to cease operating the recreation health centre run by the appellant. The appellant sued for breach of the tenancy agreement and claimed damages. The trial judge gave judgment for the appellant but dismissed the claim for loss of profits for the remaining period of the lease and the respondent cross-appealed on liability. The cross-appeal by the respondent was dismissed; the Supreme Court agreed with the finding of the trial judge that after the respondent had resolved to close down the hotel and ordered the appellant to stop operating the health centre, the conduct of the respondent evinced a clear intention to determine and put an end to its obligations under the tenancy agreement. In *HP Projects Sdn Bhd*, *supra* the respondent landlord terminated the tenancy agreement with appellant on 10 May 1994. The appellant tenant *inter alia* contended that the respondent landlord had waived its rights to terminate the tenancy agreement when the respondent landlord accepted rental payment from the appellant as late as 12 November 1994 the date after the purported termination. The Court of Appeal took the view that the appellant's claim should be considered in relation to the date of the termination of the tenancy agreement. If such rental was accepted by the respondent subsequent to the date of termination then there may be merits in the appellant's argument; otherwise it should be rejected. If it was before then there is no issue since the tenancy was still subsisting. If it was after, then such act may amount to a

waiver on the part of the respondent, as landlord, to terminate the tenancy. Since the date of lawful termination is 14 December 1994, there is no waiver on the part of the respondent in accepting such rental as the tenancy was still subsisting at that material time. The respondent had every right during the subsistence of the tenancy to collect rental. As can be seen, the facts of both cited cases are distinguishable from the present case and are therefore irrelevant.

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[14] After the 1st defendant's offer to participate in FTR was accepted some of the plaintiffs resettled into the houses provided by the 1st defendant in FTR. The 1st defendant employed workers to maintain the oil palm plantation and harvest the oil palm fruits. The 1st defendant purchased the oil palm fruits and deducted the sale proceeds towards payment of the 1st defendant's operating expenses and other deductions under the agreement. Some of the plaintiffs were employed by the 1st defendant to work on the oil palm plantation.

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[15] The fact that the 1st defendant did not give any notice of termination of the agreement to the plaintiffs is not disputed. The 1st defendant conceded that the plaintiffs have not committed any breach of the agreement. Yahya bin Yusofe (DW4) the general manager of the 1st defendant for Johor Region said that the 1st defendant did not force or order the plaintiffs to leave FTR. DW4's testimony is, however, contradicted by the 1st defendant's letters to the plaintiffs dated 16 April 2001 (exh. P45). In those letters the plaintiffs were asked to collect compensation at the 2nd defendant's office. P45 constitutes the only written notice issued by the 1st defendant to the plaintiffs and it falls far short of a notice of termination. DW4 said that the agreement could not be performed as the FTR land had been acquired by the 3rd defendant. DW4 said that the plaintiffs knew about the acquisition through news reports and information session conducted by the 1st defendant. The 1st defendant did not object to the acquisition as it was only the developer of the State land. In issuing P45 the 1st defendant has clearly shown that it no longer intended to be bound by the agreement. On the evidence the court finds that by its conduct, in particular, *vide* P45, the 1st defendant had indicated to the plaintiffs that it did not intend to go on with the agreement (s. 40 Contracts Act 1950). This act constitutes a breach of the agreement on the part of the 1st defendant. In refusing to perform its obligations under the agreement in its entirety the 1st defendant have clearly repudiated or renounced the agreement.

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- A [16] It is well established that repudiation by the 1st defendant does not put an end to the agreement. As the agreement has been broken the plaintiffs are entitled to be compensated for damages for any loss which they have suffered by reason of the breach. The plaintiffs being the innocent parties have the option of either (i) to
- B terminate the agreement, or (ii) to affirm the agreement. On the evidence the court finds that the plaintiffs have opted to accept the breach when they accepted the compensation payment from the 2nd defendant under protest and moved out of FTR and or surrendered their rights under the agreement. This is borne out by two
- C incidents. Firstly, by the plaintiffs' solicitor's letter dated 2 May 2001 (exh. P46) to the 2nd defendant stating that the plaintiffs were dissatisfied with the compensation and that they were compelled to accept the compensation. Secondly, the filing and service of the present suit *vide* Originating Summons against the
- D 1st defendant clearly indicated an intention on the part of the plaintiffs to terminate the agreement.

- E [17] For the reasons adumbrated the court finds that the 1st defendant repudiated the agreement when it refused to perform its obligations under the agreement in its entirety. The plaintiffs accepted the repudiation and terminated the agreement.

Whether The Plaintiffs Were Adequately Compensated?

- F [18] The law on compensation for loss or damage caused by breach of contract is governed by sub-ss. (1) and (2) in s. 74 of the Contracts Act 1950 which read as follows:

- G 74. (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
- H (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

- I [19] The measure of damages recoverable therefore involves the consideration of s. 74 which substantially affirms the common law rule laid down in *Hadley v. Baxendale* [1854] 156 ER 145. The common law rule affecting the measure of damages came up for consideration by the Federal Court in *Teoh Kee Keong v. Tambun Mining Company Ltd* [1967] 1 LNS 197. Ong Hock Thye FJ said:

The rule lays down the main principles as follows:

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Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

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In more compendious terms the rule has been restated by Asquith LJ in *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd* in a passage which I shall quote in full:

C

- (1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (*Sally Wertheim v. Chicoutimi Pulp Co*) This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss *de facto* resulting from a particular breach, however, improbable, however unpredictable. This, in contract at least, is recognised as too harsh a rule. Hence,
- (2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.
- (3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.
- (4) For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary sense. This is the subject matter of the 'first rule' in *Hadley v. Baxendale, supra*. But to this knowledge, which a contract breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things' of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable.

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- A (5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach if he had considered the question, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (see certain observations of Lord du Parq in the recent case of *Monarch Steamship Co. Ltd. v. Karlshamms Olejfabriker (A/B)*).
- B
- C (6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge that defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parq in the same case at page 158, if the loss (or some factor without which it would not have occurred) is a 'serious possibility' or a 'real danger'. For short, we have used the word 'liable' to result. Possibly the colloquialism 'on the cards' indicates the shade of meaning with some approach to accuracy.
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- E [20] In short, the common law rule in the assessment of damages consists of two limbs. The first limb concerns damages flowing naturally, ie, in the normal course of things from the breach. The second limb concerns the damages that the parties at the time of the making of the contract may reasonably be supposed to have contemplated, as the probable result of the breach. This court is also mindful that in the assessment of damages for breach of contract, the general rule is that the aggrieved party be put in the same position as if the contract had been performed; so that normally he is entitled to recover from the contract breaker his loss of profits, or the benefit of the bargain, as it is often called. (see *Central Malaysia Development Company Ltd v. Chin Pak Chin* [1967] 1 LNS 15 HC)
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- H [21] Learned counsel for the plaintiffs argued that the compensation paid to the plaintiffs was wholly and grossly inadequate. Firstly, the money paid out by the 2nd defendant to the plaintiffs was guided by a valuation report (exh. P39) prepared as at 27 December 1992. This report is irrelevant and out of date as the plaintiffs were displaced in 2001, some nine years after the date of valuation. On the other hand, according to two valuation reports (exhs. P48 & P50) prepared at the instance of the plaintiffs, the valuation is RM300,000 per acre. The plaintiff's valuation report was
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not challenged or refuted by the defendants as defendants did not called any evidence in rebuttal. P39 was prepared in 1992 when there was no development on the FTR land in the agricultural and commercial sense and without proper amenities and infrastructure. The situation in 2001 was very different with proper roads, balai raya, taxi services, schools, mosques, telephone, lighting and water amenities for the local population (*Hock Lim Estate Sdn Bhd v. Collector of Land Revenue, Johor Bahru* [1979] 1 LNS 31 FC; *Chuah Say Hai & Ors v. Collector Of Land Revenue, Kuala Lumpur* [1967] 1 LNS 34 HC).

[22] On this issue learned counsel for the 1st defendant submitted that under the agreement the plaintiffs are obliged to pay all the development costs advanced by the 1st defendant for the FTR project. The 1st defendant has claimed all the development costs from the 3rd defendant. The 1st defendant has no power or authority on the amount of compensation to be paid to the plaintiffs. The 1st defendant's duty was only to issue the letter to the plaintiffs to collect their cash compensation. The formula for the distribution of the compensation was prepared by Unit Perancang Ekonomi Negeri of the 3rd defendant

[23] In view of the court's earlier finding that the plaintiffs do not have an interest in the land, the valuation reports P48 and P50 are irrelevant in the assessment of damages. What are the damages flowing naturally from the breach, or which the parties knew at the time of the making of the agreement to be the probable result of the breach? Under the agreement the plaintiffs agreed to sell all the harvested oil palm fruits to the 1st defendant. The proceeds from the sale of the oil palm fruits were subject to deductions on account of monies advanced by the 1st defendant, the 1st defendant's operating expenses and development costs. The 1st defendant utilised the balance of the sales proceeds to pay cash or in dividends to the plaintiffs on Hari Raya and schooling and to the Koperasi and Tabong Kebajikan.

[24] The plaintiffs were from Tebing Runtuh 2 and Tebing Runtuh 3. There are altogether 224 participants in Tebing Runtuh 2 (list of participants exh. P33). According to the 1st defendant's statement of income and expenditure account for Tebing Runtuh 2 for the period 1994 to 1996 (exh. P49) the sale proceeds in 1996 is RM768,262.12. The balance of the sales proceeds after deductions amounted to RM303,876.92; of which RM186,254 was distributed for Hari Raya and RM117,876.92 was also distributed. However, the

- A market price of oil palm fruits would have also fluctuated between 1997 to 2000. Taking the 1996 figures as a guide, the total amount distributed to each of the participants is RM1,356 per participant. No statement of accounts for the years 1997 to 2000 was produced at the trial. Allowing for an increase in production over the years
- B and subject to a commensurate increase in operating expenditure, it is reasonable to round up that the amount that would have distributed to each participant at about RM3,000. per annum from 2001 to 2009; this computes to RM27,000 for each plaintiff.
- C [25] It is also reasonable to consider the loss for the displacement suffered by the plaintiffs. The plaintiffs have settled in FTR since 1994. When they agreed to take part in FTR they had expected it to be a long term commitment. Instead they have been displaced after a period of seven years. They have given up their former vocations after resettling in FTR. After their displacement many of
- D them have lost their livelihood and have had to make a fresh start in life. For the loss and damage for the displacement of their lives, compensation in the sum of RM500,000 per participant is a fair and reasonable sum. Taking into account that each of the plaintiffs have
- E already received the monetary equivalent of RM358,688.58 in compensation, each of the plaintiffs should be entitled to receive the balance of RM168,311.42. In the premises the question is answered in the negative.
- F [26] In consequence of the above findings the plaintiffs' claim against the 2nd and 3rd defendants is dismissed with costs. As against the 1st defendant the court orders that the 1st defendant pays to each of the plaintiffs the sum of RM168,311.42 together with interest at 8% per annum with effect from 2 May 2001 until the date of satisfaction; costs to be taxed unless otherwise agreed.
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